

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JENNIFER L. McCALEB,
Plaintiff,

v.

WALTER J. KLEIN,
Defendant.

)
)
)
)
)
)
)
)
)

C.A. 01C-10-238 PLA

Submitted: December 29, 2004
Decided: February 3, 2005

UPON PLAINTIFF'S
MOTION FOR A NEW TRIAL
DENIED

UPON PLAINTIFF'S
MOTION FOR ADDITUR
GRANTED

UPON DEFENDANT'S
MOTION FOR COSTS
GRANTED

MEMORANDUM OPINION

Somers S. Price, Jr., Esquire, Potter Anderson & Corroon LLP, Wilmington Delaware,
Attorney for Plaintiff

Author D. Kuhl, Esquire, Michael A. Pedicone, P.A., Wilmington, Delaware, Attorney
for Defendant.

ABLEMAN, JUDGE

This case presents an interesting and anomalous situation in which a Superior Court jury returned a verdict acknowledging that the defendant's conduct proximately caused the plaintiff injury, but awarded zero damages. Because the Court believes the verdict to be a jury determination that the plaintiff's testimony regarding her injuries was devoid of credibility, Plaintiff's Motion For A New Trial is **DENIED**. However, because the verdict is inconsistent as a matter of law, Plaintiff's Motion For Additur is **GRANTED**. Because the additur in the case is less than Defendant's previous offer of judgment, Defendant's Motion For Costs is also **GRANTED**.

Facts and Procedural Posture

This was a low-impact auto accident case in which the Court directed a verdict as to negligence. The plaintiff's testimony, distilled to its essence, is that she lives in constant, agonizing pain that has completely destroyed her ability to work and enjoy life. Plaintiff maintained this position despite the fact that little or no objective evidence indicates that the accident in question caused the plaintiff any injury.¹ The case therefore totally depended on the credibility of the plaintiff's report of her subjective injuries, i.e. pain and difficulty in lifting.

¹ Soft tissue injury cases often present difficulty in classifying evidence as "subjective" or "objective." For example, is a plaintiff's wince during a test designed to detect range of motion a subjective or objective result? To the extent objective evidence did exist in this case, it seemed uniformly unable to causally connect Plaintiff's problems to the accident in question, rather than her prior back injuries.

The plaintiff offered expert medical testimony from two of her treating physicians, Drs. Thompson and Turner. Neither doctor's testimony was particularly helpful to Plaintiff's case. Dr. Thompson, the original treating physician and a pediatrician by specialty, diagnosed the plaintiff as having a sprain in the dorsal area of her spine. This diagnosis seems to have been entirely based upon plaintiff's subjective complaints, i.e. her report of tenderness around her lower back and pain when the doctor tested her range of motion by lifting her legs. When the plaintiff continued to complain of pain, Dr. Thompson prescribed physical therapy and a variety of drugs, seemingly to no avail. Notably, Dr. Thompson was aware that plaintiff had a prior back injury, and was unable to offer an opinion whether the accident in question proximately caused the pain of which plaintiff complained.

Dr. Turner, who took over Plaintiff's treatment, also offered somewhat troubling testimony. While he was willing to testify that plaintiff's subjectively defined "injury" was proximately caused by the accident, it appears that the plaintiff conveniently failed to inform the doctor of her pre-existing back injury. Dr. Turner also ordered a variety of MRI's and CT scans to attempt to determine why the plaintiff would be experiencing the pain she described, and was unable to find an objective answer. Dr. Turner testified that he has continued Plaintiff on the

drug regime prescribed by Dr. Thompson, and that he is unable to offer any opinion when, if ever, the plaintiff's "injury" would heal.

Considering this testimony, the jury returned a verdict finding that the accident proximately caused injury to the plaintiff, but that she deserved no damages. Plaintiff moved for a new trial, or, in the alternative, additur, arguing that the jury's verdict cannot, as a matter of law, at once acknowledge injury and refuse to compensate it. Defendant opposes both proposed forms of relief, arguing that the verdict plainly demonstrates the jury's belief that the plaintiff exaggerated her injuries, and that any damages she did suffer are so small that they are not worthy of legal compensation.

Discussion

The Court agrees with Defendant's assessment of the verdict. It is abundantly clear that the jury, rightly or wrongly, found the plaintiff to be exaggerating her injuries in an obvious effort to "cash in" on this lawsuit. The record can be read to support this conclusion; the plaintiff's lack of candor to her physicians and the lack of objective support for her claims permeate the case. Though neither side has suggested so, it seems that the jury was confused by the directed verdict on negligence, and believed itself obligated to find that the accident had proximately caused "injury," even though it clearly did not think the case warranted damages.

The problem, of course, is what to do about it. The Superior Court has noted that Delaware juries habitually return zero verdicts for cases involving low-impact car crashes that result in soft tissue injury.² For whatever reason, Delaware juries seem unwilling to accept that such cases warrant compensation. The plaintiff has cited several Superior Court cases that have acknowledged this “problem” and granted new trials despite relatively lucid jury verdicts.³

On the other hand, the Delaware Supreme Court has warned that the standard for granting a new trial requires “extreme deference to the findings of the jury. The jury’s verdict is presumed to be correct and sustainable unless it is so grossly disproportionate to the injuries suffered so as to shock the Court’s conscience and sense of justice.”⁴ “[U]nless the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result, the jury’s findings will not be disturbed.”⁵

One important factor in this line of cases is the existence of proximate cause. Cases in which the jury refuses to find proximate cause despite uncontroverted

² *Roberts v. Cisneros*, 1998 WL 737993, Del.Super., Aug 14, 1998; *Essler v. Valentine*, 1996 WL 280889, Del. Super., May 8, 1998; *Matthews v. Mattress Queen, Inc.*, Del.Super., C.A. No. 93C-09-002, Herlihy, J. (January 12, 1996); *Crowder v. Latney*, Del.Super., C.A. No. 93C-06-042, Herlihy, J. (December 1, 1995); *Ellis v. Shipe*, Del.Super., C.A. No. 92C-09-191, Quillen J. (March 21, 1995).

³ *Supra* Note 1; *Cooper v. Russell*, 1999 WL 743973, Del.Super., Aug 17, 1999; *Burns v. Scott*, 1996 WL 769253, Del.Super., Nov 27, 1996; *Willey v. McCormick*, 2003 WL 22803925, Del.Super., Nov 13, 2003.

⁴ *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

⁵ *Walker v. Campanelli*, 2004 Del. Lexis 462 at 6-7.

medical testimony are ripe for re-trial,⁶ while verdicts that do not find proximate cause when it is contested by the defense are frequently upheld.⁷ This case does not present that circumstance. Though it was probably the product of confusion, the jury did find that the accident proximately caused Plaintiff some injury, and the Court must accept that finding. The problem here is that the jury seems to have considered the injury to be so slight that it warrants no monetary compensation.

Another way to divide these cases is the existence of testimony regarding damages. In cases where the defense does not rebut expert medical testimony regarding damages, or concedes that the accident caused at least some damages, a zero verdict is necessarily “against the weight of the evidence,” and a re-trial or additur is appropriate.⁸ Having reviewed the excerpts of the transcripts the plaintiff submitted with this Motion, the Court finds that this is the circumstance presented in this case. At trial, the defendant offered the expert testimony of Dr. Gelman. Dr. Gelman conceded that the plaintiff suffered some minor soft tissue injury for a few weeks⁹, for which physical therapy was an appropriate treatment.¹⁰

⁶ *Maier*, 697 A.2d 747; *Amalfitano v. Baker*, 794 A.2d 575 (Del. 2001); *Cooper*, 1999 WL 743973; *Willey*, 2003 WL 22803925.

⁷ *Walker*, 2004 WL 2419104; *Dunn v. Riley*, 2004 WL 2830886, Del.Supr., Dec 01, 2004.

⁸ *Maier*, 697 A.2d 747; *Amalfitano*, 794 A.2d 575 (Del. 2001); *Roberts*, 1998 WL 737993; *Burns*, 1996 WL 769253.

⁹ Pl. Mot. For New Trial, Ex. C, Dep. of Dr. Andrew J. Gelman at 35 (“So I believe that we [Drs. Turner, Thompson, and Gelman] are probably similar through 1999 and the early part of 2000, that there was a soft tissue injury affecting the spanning musculature from the mid back to the lowermost part of the neck and the uppermost part of the lower back.”).

¹⁰ *Id.* at 32 (“Q: Okay, are you disagreeing in any way with the necessity for that care? A: No. It’s a reasonable treatment addressing some soft tissue injuries.”).

What he vigorously contested was Plaintiff's assertion of ongoing or permanent damage that eliminated her ability to work.

The verdict must therefore be read to acknowledge that the defendant proximately caused the plaintiff to suffer a minor back sprain that required a few weeks of physical therapy to cure, but, at least in the minds of the jurors, that injury is worth zero damages. While the defendant correctly points out that the concept of *injury absque damno* has been occasionally applied to uphold this type of finding,¹¹ the Delaware Supreme Court, in cases such as *Maier* and *Amalfitano*, seems to be moving away from granting juries the deference to make such a determination in soft-tissue injury cases. In doing so, the Supreme Court seems to be acknowledging that, no matter how clear and uncontested the medical testimony, it is often impossible to convince a juror that a minor fender-bender can cause significant injury unless that juror already knows through personal experience.¹² Of course, jurors who have had such experiences are quickly weeded out during *voir dire*.

¹¹ *Walker*, 2004 WL 2419104; *Szewczyk v. Doubet*, 354 A.2d 426 (Del. 1976); *Maloney v. Love*, 2000 WL 1211168, Del.Super., Aug 08, 2000.

¹² The Court reaches this decision with the knowledge that *Walker* may represent a shift back to allowing juries to punish exaggerating, hyper-litigious parties by refusing to find that their injuries are worthy of compensation. However, *Walker*'s wording, though strong, carefully distinguished cases in which the defense concedes some injury from cases where the defense contests all injury. Dr. Gelman's testimony therefore pulls this case into the ambit of *Maier* and its progeny, rather than *Walker*.

Having found that the jury's verdict must fail as a matter of law, it remains for the Court to fashion a remedy. The plaintiff suggests a new trial solely on the issue of damages. This solution, which the defendant opposes, does not seem to me to be a fair outcome. The fact that the jury's verdict is legally inconsistent does not make it any less clear: the jury believed the plaintiff to be lying about her injuries and sought to avoid awarding her damages. A new trial solely on damages would discard this unambiguous jury pronouncement like the baby with the bathwater. Moreover, the verdict's inconsistency leaves it uncertain whether the jury was confused about the legal standard for causation, damages, or both. If the Court were inclined to grant a re-trial, it would be for all issues, not just damages.

However, as noted above, the Court believes that the jury's verdict is clear, and that the minimum award owed the plaintiff, as a matter of law, is recompense for a back sprain that lasted a few weeks. This is the only injury about which the experts agreed, and the jury was free to disbelieve all of the plaintiff's subjective complaints and to wholly adopt the testimony of Dr. Gelman.¹³ The Court will therefore seek to value this injury equitably, in the context of the procedural posture of the case, by **GRANTING** additur.

Before trial, the defendant made, on the record, an offer of judgment of \$7,500. In my view, this sum represents the amount that the defendant thought the

¹³ *Walker*, 2004 WL 2419104 at 2.

injury was worth, plus an amount for the fees that the defendant would avoid by settling the case at that point, plus some other amount to avoid the risk of an unsubstantiated, gratuitous verdict. As noted above, the verdict indicates that the jury adopted the defendant's assessment of the plaintiff's injuries. I therefore begin my additur analysis at \$7,500, and then work downward to account for the fact that the plaintiff forced the defendant to incur fees, and that the defendant, substantively, won a trial.

The fees involved are easily determined, as they have been detailed in the Defendant's Motion For Costs. Dr. Gelman's testimony, including deposition, subpoena, transcript, recording, and trial fees, cost the defendant \$3,266.65. The fees appear to be standard fare for a personal injury case, and the Court finds them to be reasonable. In addition, Plaintiff's refusal to accept the \$7,500 forced defense counsel to try, and effectively win, the case. The Court believes that \$1,500 would adequately compensate defense counsel for his preparation and three-days of trial time.

Finally, the Court must consider the risk factor that a trial would have resulted in a gratuitous award well beyond the scope of Plaintiff's injury. While I believe that a substantial portion of the \$7,500 was devoted to this factor, and could therefore be discounted, the procedural posture of the case leaves me hesitant to do so. Because the verdict has failed as a matter of law, the only alternative to

this additur is to grant the plaintiff a new trial, complete with the risk of a gratuitous verdict. Discounting that risk would therefore defeat the purpose of this additur, i.e. to reasonably compensate the plaintiff so that a new trial is unnecessary. I therefore attach zero value to the defendant's discounted risk consideration.

The Court will therefore **GRANT** Plaintiff's Motion For Additur, in the amount of \$6,000. This amount represents the \$7,500 from the October 25, 2004 Offer of Judgment, minus the Court's estimate of reasonable attorney's fees. Because this amount is less than the Offer of Judgment, the Court must also **GRANT** Defendant's Motion For Costs in the amount of \$3,266.65. The total amount owed to the plaintiff by the defendant to conclude this case will therefore be \$2,733.65. The Court considers this amount to approximate Defendant's estimate of the value of Plaintiff's injury based on Dr. Gelman's opinions, which appears to have been the only testimony credited by the jury.

If the plaintiff is dissatisfied with this additur, she may, of course, appeal this Order to the Delaware Supreme Court. The Court therefore believes it may be helpful to inform the parties, purely in *dicta*, of its belief that the jury verdict on proximate cause was based solely upon confusion regarding the directed verdict on negligence. It is the Court's opinion that the plaintiff caught a lucky break in the

case, the result of which was the necessity of granting additur.¹⁴ Given the testimony and evidence presented, if the jury had returned a verdict not finding proximate cause and granting zero damages, which I believe was their intent, I would not have granted the plaintiff any relief.

For these reasons, Plaintiff's Motion For A New Trial is hereby **DENIED**, in favor of **GRANTING** the additur detailed in this Opinion. Defendant's Motion For Costs is hereby **GRANTED**. Judgment is entered against the defendant in the amount of \$2,733.65.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Somers S. Price, Jr., Esquire
Authur D. Kuhl, Esquire

¹⁴ This case is factually identical to *Walker*, which upheld a zero verdict that was clearly meant to punish an exaggerating plaintiff, with the sole exception that this jury confusedly found proximate cause.